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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 190.

COOLEY ELLIS,

Appellant,

vs.

OHIO TURNPIKE COMMISSION,

Appellee,

and

COOLEY ELLIS,

Appellant,

vs.

HON. JOY SETH HURD, *et al.,*

Appellees.

MOTION TO DISMISS.

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Appellees.

MOTION TO DISMISS.

Now separately come (1) Joy Seth Hurd, Julius M. Kovachy and Lee E. Skeel, Judges of the Eighth District Court of Appeals, State of Ohio, named appellees in the suit entitled Cooley Ellis, Appellant, vs. Hon. Joy Seth Hurd, et al., Appellees, in the caption, who appear specially and only for the purposes of this motion, and (2) Ohio Turnpike Commission, appellee in the suit entitled Cooley Ellis, Appellant vs. Ohio Turnpike Commission, Appellee, in the caption, and pursuant to Rule 16, paragraphs 1(a) and 1(b) of the Revised Rules of the Court, and severally move that the Court dismiss each of the appeals in which they are respectively named appellee, with costs, upon the following grounds:

1. The appeal in the suit entitled "Cooley Ellis vs. Hon. Joy Seth Hurd, et al." is not within the juris-

diction of this Court because not taken in conformity to statute or to the Rules of this Court.

2. The federal questions sought to be raised in each of said appeals were not timely or properly raised or expressly passed on.

3. The judgments in each of said appeals rest on adequate non-federal bases.

4. Neither of said appeals present substantial federal questions.

DECISIONS BELOW.

The appellant's discussion of the decisions which appellant is attempting to appeal herein, as set forth in appellant's jurisdictional statement, is inaccurate and ambiguous.

Appellant is appealing two separate and distinct decisions of the Supreme Court of Ohio entered in separate proceedings in that court involving different parties and separate issues.

The first of the decisions herein appealed, as set forth in the caption, concerned two separate suits originally filed in the Court of Common Pleas, Lucas County, Ohio, by the appellee, Ohio Turnpike Commission, involving the appropriation of separate parcels of land owned by appellant, Cooley Ellis, in connection with the construction of the Ohio Turnpike. *In Re Appropriation by Ohio Turnpike Commission: Ohio Turnpike Commission, appellant, vs. Ellis, appellee*, 164 Ohio State 377, 131 N. E. 2d 397. This decision is reproduced beginning at page 62a of appellant's jurisdictional statement.

The other decision herein appealed concerns a proceeding in procedendo. This suit was filed by the appellant as an original action in the Supreme Court of Ohio against the individual judges of the Eighth District Court

of Appeals, State of Ohio, sitting by designation in the Sixth District in a separate equity proceeding about which appellant complained in the procedendo action. *The State ex rel. Ellis vs. Hurd, et al., Judges,* 164 Ohio State 403, 132 N. E. 2d 100. This decision is reproduced beginning at page 115(a) and the journal entry of the Supreme Court of Ohio sustaining the demurrer to Mr. Ellis' petition is reproduced beginning at page 117(a) of appellant's jurisdictional statement. In the procedendo suit appellant was seeking an order from the Supreme Court of Ohio requiring the Sixth District Court of Appeals of Ohio to strike certain proceedings from the record and to take further action in an entirely separate equity proceeding, not the subject of the appeals now before the Court whereby, as required under the law of Ohio, the appellant had originally sought in the Court of Common Pleas of Lucas County, Ohio, to enjoin the prosecution of the appropriation proceedings above mentioned on various, including constitutional, grounds. The decision of the Supreme Court of Ohio in the equity suit from which no appeal was taken to this Court is reported as *Ellis vs. Ohio Turnpike Commission*, 162 Ohio State 86, 120 N. E. 2d 719, and is reproduced beginning at page 97a of the appellant's jurisdictional statement.

JURISDICTION.

1. The Procedendo Suit.

The appeal in the procedendo action is not within the jurisdiction of this Court because not taken in conformity to the rules of this Court and requires a dismissal of the appeal pursuant to the provisions of Rule 10 of the Court.

The appellees in the procedendo action, the Honorable Joy Seth Hurd, et al., Judges of the Eighth District

Court of Appeals of Ohio, are not named as parties in the Notice of Appeal and were not served with copies of the Notice of Appeal.

The Notice of Appeal indicates in the heading that the appellee is Ohio Turnpike Commission and the proof of service certifies service of the Notice of Appeal only on counsel of record for Ohio Turnpike Commission and does not certify service on the named appellees in the appellant's jurisdictional statement.

Ohio Turnpike Commission, named as appellee in the Notice of Appeal, was not even a party to the procedendo proceeding or to the judgment from which the appeal is taken. The only parties in the procedendo action filed by the appellant as an original action in the Supreme Court of Ohio were the appellant as relator, and the individual judges of the Eighth District Court of Appeals as respondents. No relief against Ohio Turnpike Commission was prayed for and the Commission did not enter an appearance in the procedendo action.

There being a defect of necessary parties and the appeal not being taken in conformity to the Rules of this Court, the appeal in the procedendo action, entitled *Cooley Ellis, appellant, vs. Hon. Joy Seth Hurd, et al., appellees,* should be dismissed. *Wilson vs. Kiesel,* 164 U. S. 248; *Miller vs. McKenzie,* 77 U. S. 582.

The appeal in the procedendo action should be dismissed for the additional reason that the Notice of Appeal indicates no jurisdictional basis for an appeal to this Court. The Notice merely states generally that the decision of the Supreme Court of Ohio in sustaining the demurrer to appellant's petition is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Nowhere is there any statement that the validity of a statute of the State of

Ohio was an issue on constitutional grounds or that the decision of the Supreme Court of Ohio sustained the validity of a statute on that basis. Such general and indefinite statements are inadequate and present no questions for the decision of the Court. *Seaboard Airline Railway vs. Watson,* 287 U. S. 86.

In fact, the jurisdictional requirements for an appeal are absent in the procedendo action. As the decision of the Supreme Court of Ohio indicates, the demurrer to the appellant's petition was sustained on procedural grounds on the basis some of the matters to which he referred had already been litigated and finally disposed of while others might perhaps be the subject of further litigation in an action or actions in the Court of Common Pleas in Ohio having jurisdiction. It was held that an action in procedendo in the Supreme Court of Ohio was not appropriate or maintainable to accomplish the objects of the appellant and could not be made the instrumentality of review of other actions. *The State, ex rel. Ellis vs. Hurd, et al., Judges, supra.* The judgment clearly was premised on adequate non-federal bases.

2. The Appropriation Suits.

A. Preliminary Statement.

The appropriation suits were originally filed by the appellee, Ohio Turnpike Commission, on September 4, 1953 and September 10, 1953, to acquire portions of two parcels of unimproved land owned by appellant pursuant to the provisions of the Ohio Turnpike Act, Ohio Revised Code, Sections 5537.01 to 5537.99. Upon trial of these suits in the Court of Common Pleas of Lucas County, Ohio, judgment was entered on the verdicts of juries in the amount of $96,825.00 as to one parcel of land and in the amount of $44,346.50 as to the other.

Pursuant to the provisions of Ohio Revised Code, Section 5537.06, Subdivision O, the Ohio Turnpike Commission deposited the amounts assessed by juries with the Clerk of the trial court for distribution to the land-owner. Pursuant to this statute, title became vested in the State of Ohio and the Commission has taken possession of the land appropriated, constructed a section of the Ohio Turnpike over the land so acquired, which was opened for the use of the general public on October 1, 1955, and has continuously operated the turnpike over the land appropriaated since that date.

Appellant, Cooley Ellis, appealed the appropriation cases to the Court of Appeals for the Sixth District, Ohio, where the judgments of the trial court were reversed by a divided court for alleged errors occurring during the trial of the causes, and remanded to the trial court for further proceedings according to law. *In re Appropriation of Property of Cooley Ellis by Ohio Turnpike Commission,* 70 Ohio Law Abstract 417, 438: Appellant's Jurisdictional Statement, pages 31a to 61a, and 81a to 96a.

The judgments of the Court of Appeals, reversing the judgments of the trial court, were in turn reversed by the Supreme Court of Ohio on appeal by the appellee, Ohio Turnpike Commission, and the judgments of the trial court were affirmed. *In re Appropriation by Ohio Turnpike Commission: Ohio Turnpike Commission, appellant vs. Ellis, appellee, supra.*

These are the appropriation cases appealed to this Court herein.

Under the law of Ohio the only issue in an appropriation suit is the amount of the damage to the landowner. No answer or other pleading is filed by the landowner in the appropriation suit. On appeal in such suits the only questions for review are questions of service of process,

admission and rejection of evidence, the charge of the court upon the proper measure of compensation and similar matters. Constitutional questions, questions as to the necessity of the taking and other questions as to legal impediments as to bringing or maintenance of the suit must be raised in separate injunction proceedings in Ohio. *P. C. C. & St. Louis Ry. Co. vs. City of Greenville,* 69 Ohio State 487, 69 N. E. 976; *Sargeant vs. Cincinnati,* 110 Ohio State 444, 144 N. E. 132; *Cincinnati vs. Vester,* 281 U. S. 439.

Following the settled practice in Ohio, appellant Ellis filed a proceeding in equity in the Court of Common Pleas, Lucas County, Ohio, raising questions of the sufficiency of preliminary negotiations of the Turnpike Commission, engineering design and feasibility of the section of the turnpike passing over his property, constitutionality of the Turnpike Act and other related matters not involved in the valuation of the property in the appropriation proceedings. The demurrer of the Ohio Turnpike Commission to Ellis's petition being sustained in the trial court, he appealed on law and fact to the Court of Appeals, Sixth District, Ohio, where the demurrer was again sustained, the petition dismissed with prejudice and judgment entered for the Commission with costs. On appeal to the Supreme Court of Ohio by appellant the judgment of the Court of Appeals was reversed and final judgment was entered for Mr. Ellis to such an extent as would permit him to erect billboards, signs, etc. on his land not taken for turnpike construction purposes, but was affirmed on all other grounds. *Ellis, appellant vs. Ohio Turnpike Commission, appellee,* 162 Ohio State 86, 120 N. E. 2d 719. Appellant's Jurisdictional Statement, pages 97a to 106a. No appeal from this decision of the Supreme Court of Ohio was taken to this Court by the appellant.

On remand of the equity suit to the Court of Appeals, Sixth District, Ohio, the Ohio Turnpike Commission, pursuant to order of the Court of Appeals, demurred to the remainder of the petition in the equity suit which demurrer was sustained by Judges Hurd, Kovachy and Skeel of the Eighth District, Ohio, sitting by designation in the Sixth District. *Ellis vs. Ohio Turnpike Commission,* 100 Ohio App. 10; 122 N. E. 2d 713. Appellant, Ellis, again appealed the equity suit to the Supreme Court of Ohio which overruled his motion to certify and dismissed his appeal as of right on the basis that no debatable constitutional question was involved. *Ellis vs. Ohio Turnpike Commission,* 163 Ohio State 157, 125 N. E. 2d 880. Again no appeal was taken by the appellant from this decision of the Ohio Supreme Court to this Court.

Appellant Ellis, having litigated constitutional questions in the equity suit twice in the Supreme Court of Ohio and having failed to appeal those decisions to this Court, is now attempting to have this Court pass upon those questions in the appropriation suits here appealed.

B. Absence of Jurisdictional Requirements for Appeals.

The constitutional issues which appellant seeks to raise in the appropriation suits were raised for the first time either in this Court in his jurisdictional statement or in the Supreme Court of Ohio on his applications for rehearing. These applications were overruled on January 25, 1956 by that Court without the constitutional issues being expressly passed upon and without opinion.

Appellant states that the issues in this appeal come under two subdivisions: (1) "whether the Appellant was given due process of law and adequate compensation for his property and the damage inflicted upon him" and (2) "the question as to the constitutionality of the Ohio Turnpike Act." Appellant's Jurisdictional Statement, page 12.

The question of "due process of law and the adequate compensation for his property" was not contained in Appellant's Notice of Appeal and is raised in the Jurisdictional Statement for the first time. This question, not being set forth in the Notice of Appeal and involving no question as to the constitutionality of a state statute, presents no question for the consideration of this Court on appeal.

Likewise, numbered questions (6), (7) and (8) on page 9 of Appellant's Jurisdictional Statement were not included in the Notice of Appeal, involve no questions as to the constitutionality of a state statute, and present no questions for the consideration of this Court on appeal.

Numbered question (9) was not included in the Notice of Appeal and presents no question for consideration by this Court on appeal.

The remaining question as to the constitutionality of the Ohio Turnpike Act has been attempted to be raised by some of the questions set forth in Appellant's Notice of Appeal and in some of the remaining numbered questions at pages 7 and 8 of Appellant's Jurisdictional Statement.

Question (2) seeks to draw in issue the constitutionality of the right of the Commission to appropriate abutters' or access rights, and question (3) the right of the Commission to appropriate property for purposes of restaurant and similar service establishments incidental to the use of the turnpike. The exercise of such rights which are clearly granted by the Turnpike Act involves matters of the construction of a state statute or of the improper exercise of power under the statute, and not of the validity of the statute itself on constitutional grounds, and provide no basis for an appeal to this Court. *Jones, et al. Trustees, vs. Prairie Oil and Gas Co.*, 273 U. S. 195; *Zucht vs. King*, 260 U. S. 174.

The remaining questions presented by the appeals, numbered (1), (4) and (5), which attack the delegation

to the Ohio Turnpike Commission of the right to appropriate property for turnpike purposes and take title to the property in the name of the State of Ohio, and raise the question of the requirement of a hearing on the necessity of the appropriation, even if properly or timely raised, are so patently insubstantial as to require dismissal of the appeals. The Act has heretofore been sustained as constitutional when attacked on grounds of delegation of legislative powers. *State, ex rel. Allen vs. Ferguson*, 155 Ohio State 26, 97 N. E. 2d 660. The requirement of a hearing on the question of necessity was litigated by the appellant in the separate equity action discussed above from which no appeal was taken to this Court.

However, none of the questions sought to be raised were timely and properly raised or expressly passed upon by the Supreme Court of Ohio in the appropriation suits here appealed.

The errors assigned by appellant in his cross appeals to the Supreme Court of Ohio in the appropriation suits include no mention of constitutional issues, being limited entirely to alleged errors occurring in the course of the trial in the trial court. The errors assigned by appellant in the Supreme Court of Ohio are listed in Appendix I, at page 13.

Federal constitutional issues, the subject of the appeals to this Court, were attempted to be raised by appellant for the first time in the appropriation suits on applications for rehearing before the Supreme Court of Ohio. Appellant's Jurisdictional Statement, pages 4 and 5. As already noted, the Supreme Court of Ohio, in overruling the applications for rehearing without opinion, did not expressly pass upon the issues attempted to be raised for the first time on motion for rehearing in the Supreme Court of Ohio.

The excuse advanced by appellant for not raising constitutional questions at an earlier stage in the proceedings —that the Supreme Court of Ohio unexpectedly permitted an appeal in the case from the judgment of the Court of Appeals, Sixth District, Ohio, Appellant's Jurisdictional Statement, page 4—is spurious and a *non sequitur*. The right of appeal in such cases to the Supreme Court of Ohio is unquestioned. Constitution of Ohio, Article IV, Section 2; *Tod vs. Wick Brothers & Co.*, 36 Ohio State 370 (1881); *Place vs. Elliott*, 147 Ohio State 499; 72 N. E. 2d 103 (1947); *Marion Machine Foundry and Supply Company vs. Cincinnati Coffin Company*, 162 Ohio State 455, 124 N. E. 2d 132 (1955).

This Court has repeatedly held that federal questions are not timely or properly raised if raised for the first time on application for rehearing before the highest appellate court in the particular state. *Mergenthaler Linotype Co. vs. Davis*, 251 U. S. 256; *Live Oak Water Users' Association vs. Railroad Commission*, 269 U. S. 354. Likewise it is well settled under Ohio practice that constitutional questions cannot be raised for the first time in the Supreme Court of Ohio. *The Village of Clarington vs. Alther*, 122 Ohio State 608, 174 N. E. 251. *Chicago B. & Q. Rd. vs. Chicago*, 166 U. S. 226, relied on by the appellant as authority for permitting raising such questions on rehearing, is not in point for the reason that the constitutional questions in that case were raised in the trial court on motion for new trial under apparently proper practice in Illinois and were assigned as the bases for error in the Supreme Court of Illinois. Such is not the instant case.

Constitutional objections to appropriation proceedings are properly raised under the law of Ohio only if raised in separate equity proceedings. *P. C. C. & St. Louis*

Ry. Co. vs. City of Greenville, supra; Sergeant vs. Cincinnati, supra; Cincinnati vs. Vester, supra.

This rule was not only recognized by appellant but invoked by him in the separate equity proceeding he instituted in the Court of Common Pleas of Lucas County, Ohio, to enjoin prosecution of the appropriation suits on various, including constitutional, grounds. The issues in his equity suit as already noted were thoroughly litigated twice in the Court of Appeals, Sixth District, Ohio, and twice in the Supreme Court of Ohio. As to certain of appellant's claims concerning the right of the appellee to appropriate rights to erect and maintain billboards and signs on appellant's remaining property, appellant was successful. As to his other claims appellant was unsuccessful. *Ellis vs. Ohio Turnpike Commission,* 162 Ohio State 86, 120 N. E. 2d 719; 100 Ohio App. 10, 122 N. E. 2d 713; 163 Ohio State 157, 125 N. E. 2d 880. Appellant took no appeal from these decisions to this Court.

The motion to dismiss the appeals in both the procedendo suits and in the appropriation suits should be granted.

Respectfully submitted,

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APPENDIX I.

Appellees' Cross-Assignments of Error in Supreme Court of Ohio From Cause No. 4777 in Court of Appeals, Lucas County, Ohio.

"ASSIGNMENT OF ERROR

Appellee-Cross-Appellant Cooley Ellis assigns as error the action of the Court of Appeals of Lucas County, Ohio on March 14, 1955:

(1) In overruling assignment of error in admission of evidence as to the cost of the property in 1947. (C. A. Assignment #3);

(2) In overruling assignment of error in failure to limit the evidence of the cost of the property. (C. A. Assignment #4);

(3) In overruling assignment of error in court instructions as to billboard and sign rights, and in failing to charge in relation to abutter's rights appropriated.

(4) In overruling assignment of error in that the verdict was manifestly against the weight of the evidence.

WINTER & FRANK,

Attorneys for Appellee-Cross-Appellant."

Appellees' Cross-Assignments of Error in Supreme Court of Ohio From Cause No. 4778 in Court of Appeals, Lucas County, Ohio.

"ASSIGNMENT OF ERROR

Appellee-Cross-Appellant assigns as error the action of the Court of Appeals of Lucas County, Ohio on March 14, 1955:

1. In overruling assignment of error concerning admission of evidence of what Ellis had paid for the subject property. (C. A. Assignment No. 3).

2. In overruling assignment of error as to witness Ruppert.

3. In overruling assignment of error in excluding evidence of potential sales as a shopping center which represented the best use of the property.

4. In overruling assignment of error based on exclusion from evidence of a lease of a part of the property (Exhibits 32 and 32-a), and in refusing to permit the cross-examination of the Commission's experts in relation thereto, or in relation to rentals, generally.

5. In overruling assignment of error charging abuse of the discretion in limiting time for argument.

6. In overruling assignment of error concerning the delivery to the jury before argument of Request No. 2 of the Commission.

7. In overruling assignment of error by the court in its charge to the jury in failing to charge on the abutter's rights appropriated.

8. In overruling an assignment of error that the verdict and judgment are each contrary to the manifest weight of the evidence.

WINTER & FRANK,

Attorneys for Appellee-Cross-Appellant."

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BRIEF OPPOSING MOTION TO DISMISS

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PRELIMINARY STATEMENT

For a full understanding of the issues presented it is important to understand the eminent domain procedure under Ohio law. Eminent domain is a throwback to the days of kings where nothing more is required for the seizure of private property than the desire of the king to take it. In this country the power and right to seize is only curbed by our constitutional guarantees, both state and federal. Consequently in every proceeding whereby private property is seized by governmental authority, the constitutional questions are inherent in the very nature of the proceeding and must be presumed to have received the attention of the court at all stages of the proceedings.

The state of Ohio is included in the majority group of states wherein the exercise of the power of eminent domain is an administrative and not a judicial function of the government.

Appellees concede, and rightly so, that under Ohio procedure, appropriation proceedings are strictly statutory; that they bear no resemblance to a judicial proceeding; require no pleadings and have no other issue aside from fixing the amount of just compensation for the property seized. The property owner is not permitted to put in any motion, answer or other pleading and is limited strictly to the testimony of himself and his witnesses on the sole issues of value and damage.

Nor is there any provision or prescribed procedure requiring the property owner to institute a suit in equity. At his option he may resort to equity on the theory that he has no other remedy and seek to enjoin the appropriation proceeding on the ground that no necessity exists for the

taking or for other reasons but there is nothing in Ohio law that requires him so to do.

The Ohio appropriation procedure calls for nothing more than the resolution for the taking, petition for impanelling of a jury to assess values and damages and entry of judgment confirming the award. No provision is made for new trial and appeal is limited to the Court of Appeals where a review may be had of the proceedings below and the award either confirmed or remanded for a further assessment.

We think we should likewise call the Court's attention to the sequence of events in this litigation for a better understanding of the situation.

Shortly after institution of the appropriation proceedings appellant herein sought to enjoin the proceedings by a suit in equity wherein he urged that there was no necessity for the taking; that the Turnpike Act was unconstitutional and that his property was being seized without due process of law. A demurrer to his petition was sustained and ultimately reached the Supreme Court of Ohio, terminating in the decision of that court as appears in Appendix D of the Jurisdictional statement.

Since no injunctive relief could be obtained the appropriation cases were heard and pending on appeal in the Court of Appeals when the Supreme Court of Ohio rendered its decision in the equity case. Appellees in the meantime had seized appellant's property and excavated the same to a large extent. In the appropriation proceedings appellant's property, including sign rights, abutter's rights and the right of way had been assessed and appropriated. The decision of the Ohio Supreme Court which combined appellant's case with another man's case without privity

of interest, apparently was in favor of appellant with regard to sign rights, was confusing as to what was intended relative to sustaining the demurrer and gave the appellant no relief whatever other than a mere expression of opinion as to the validity of the taking of sign rights.

Several months after the said decision in the equity case the Court of Appeals reversed the awards in the appropriation cases. Appellant was held to have not obtained fair compensation and appellees then appealed to the Supreme Court of Ohio and ultimately prevailed. The procedendo proceeding was then started for the purpose of clarifying the decision in the equity case and applications for rehearing were made in the appropriation proceedings. The Supreme Court of Ohio ruled against appellant in all matters, being well aware of appellant's contention that he was being deprived of his property without just compensation and without due process of law.

THE PROCEDENDO PROCEEDING

This is a combined appeal which was designed to bring all suits before this Court for the purpose of showing that the Supreme Court of Ohio was at all times aware of appellant's constitutional claims and decided the same adversely to him. Technically the title to the procedendo case is against the Judges of the Court of Appeals but in reality the Turnpike Commission is the real party in interest and the proceeding was defended by them and by the same attorneys as the other cases.

As heretofore pointed out this proceeding was for the purpose of clarifying the decision of the Supreme Court of Ohio in the equity case wherein the appropriation of sign rights at least was decided in appellant's favor, but

which came to naught by reason of their prior appropriation which remains unmodified. We concede that the procedendo proceedings in themselves would not warrant an appeal to this Court; that no practical relief can be obtained therefrom and that the entire equity case is largely moot inasmuch as the injunctive relief therein sought cannot now be obtained, the Turnpike now having been fully completed. The only value of the procedendo proceeding would be in connection with the appropriation cases to show that the Supreme Court of Ohio passed on the questions involved and to acquaint this Court with the controversy in its entirety.

THE APPROPRIATION CASES

Appellee in its motion to dismiss expends considerable effort in presenting the case on the merits or rather the final hearing of this cause. It is pointed out that appellant was awarded a total in excess of a hundred and forty thousand dollars. We might well state that said sum is not one tenth of the damage sustained, but we are not prepared nor are we required at this stage of the case to present a brief which will be comprehensive on the questions raised. Neither are we required at this stage to brief the case as to whether the claim of appeal is sufficient to justify all of the questions which we have raised. It is enough if only a few are properly before this court and to sustain the appeal it is only necessary to show that there is probable jurisdiction.

The main contention with respect to the probable jurisdiction of this court is whether appellant's contentions were timely raised in the Ohio courts. We are well aware of the numerous decisions of this court that as a general

rule, a question raised for the first time on rehearing in a state court comes too late. There are some exceptions, to-wit: where no opportunity was given to sooner present them and where the final decision of a state supreme court is a matter of surprise.

As we have pointed out, appropriation cases in Ohio are strictly a matter of statute. Without pleadings of any kind no defense other than values can be contested; there is no provision for a new trial in the trial court and appeal is expressly limited to the Court of Appeals. In cases of this character however, it is inherent in the very nature of the proceedings that a property owner's property rights are to be protected by the constitutional guarantees. Therefore no opportunity presented itself to appellant to raise these questions except on motion for rehearing before the Supreme Court of Ohio before appealing to this court.

Appellee makes light of our contention that we were caught by surprise by the decision of the Supreme Court of Ohio. We do not claim surprise with reference to its decisions upholding the constitutionality of the Turnpike Act. True that was to be expected We do claim surprise when that court for the first time in its history took jurisdiction on appeal of a purely statutory and administrative proceeding to annul the order of the Court of Appeals for a mere reassessment of damages; and where in a long line of decisions and interpreting the constitution of the State of Ohio, they had consistently held that a judgment or decree for the purposes of appellate jurisdiction meant a *final* judgment.

When the Supreme Court of Ohio took unwarranted jurisdiction of a statutory appropriation proceeding and annuled the order of the Court of Appeals granting him a reassessment of his damages, which was provided for

under the laws and constitution of that State, appellant was denied due process of law and his property was taken without just and fair compensation. Obviously he had no opportunity to raise this question until after the Supreme Court had made its decision depriving him of his rights and certainly the raising of the same on rehearing cannot be said to be too late.

Aside from the deprivation of his vested right to a reassessment; appellant was deprived of due process for the reason that the description of the property was so vague and uncertain in legal description as to not form a proper basis for the appropriation proceeding; likewise and for like reason the sign rights and abutter's rights were so taken; and the award made was not made solely to appellant although he was the undisputed owner of the property, but made to a large number of people without defining or determining their interest and with the result that appellant could obtain nothing except by long and expensive litigation against unknown defendants. This latter type of denial of due process originated in the lower court but under the law of the state this appellant was denied any opportunity to raise the same in an appropriation proceeding.

We here want to point out that the equity suit was not obligatory to the appellant and that he never had his day in court for the reason that he was blocked by a demurrer which in disregard of all recognized practice was split up by the Supreme Court of Ohio. Appellant never had an opportunity to present his case and certainly can be in no worse position than if he had never started it. There just was no binding adjudication in the case.

All the citations of authority by appellee deal with judicial determinations of the courts and with cases where

issues are framed and tried out between the parties. They simply have no application to a case of this character.

Appellee contends that the case of *Chicago B. & Q. Rd. v. Chicago,* 166 U. S. 226 is not in point for the reason that in that case the constitutional questions were raised in the trial court on motion for new trial "*under apparently proper practice in Illinois.*" We emphasize their own statement for the reason that in Ohio no provision is made for new trial in the trial court. Therefore at no stage of the proceeding did this appellant have an opportunity to raise the constitutional questions in the appropriation proceedings prior to his application for a rehearing in the Supreme Court of Ohio.

On page 231 of the above cited case (41 L. Ed. 983) Justice Harlan said:

> "It is not, therefore, important that the defendant neither filed nor offered to file an answer specifically setting up or claiming a right under the constitution of the United States. It is sufficient if it appears from the record *that such right was specially set up or claimed in the state court in such manner as to bring it to the attention of that court.*"

Appellee lays great stress on the fact that the Supreme Court of Ohio has heretofore upheld the constitutionality of the Turnpike Act. That is true as to only certain phases of the act that came into question and whether the act would be sustained in this Court in an eminent domain proceeding certainly presents a meritorious question for consideration.

However we refuse to be side tracked from our main contention which is that even conceding the constitutionality of the act, that we have been deprived of our property

without just compensation and without due process of law for the reasons above stated. Further appellee's statement that we seek an interpretation of the Turnpike Act relative to abutter's rights etc. is untrue and misleading. Our claims relative to description of property, sign rights and abutter's rights is that the description of the same in the appropriation proceeding is so vague and uncertain that it cannot be ascertained just what was taken and the jury were in no position to make an award on the basis thereof.

We believe that we have met the jurisdictional requirements of this court without doubt on our contention that the final decision of the Supreme Court of Ohio which deprived us of a reassessment of damages violated our constitutional rights and calling attention to it on application for rehearing was sufficient.

Secondly we believe we are on solid ground when we say that by reason of misdescription, indefiniteness and uncertainty the appropriation proceedings are fatally defective from a constitutional standpoint and that a general award to a number of persons without any specific award to appellant, has the same effect as no award whatever and that he has received no compensation.

Thirdly we believe that the Ohio Turnpike Act is void as an unlawful delegation of the powers of the legislature and of the power of eminent domain and that in a proceeding of this character that even if not raised except on rehearing that it is timely and that in any event if this court takes jurisdiction of this cause on other grounds, that it may, in its discretion, render an opinion on matters that

otherwise might not have been properly placed before the Court.

We respectfully request that the motion to dismiss the appeals be denied.

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18/28

Office - Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1956

No. 190

COOLEY ELLIS, *Appellant*,

v.

OHIO TURNPIKE COMMISSION, *Appellee*,

and

STATE OF OHIO, EX REL. COOLEY ELLIS, *Appellant*,

v.

HON. JOY SETH HURD, ET AL., *Appellees*.

On Appeal from the Supreme Court of
the State of Ohio

PETITION FOR REHEARING OF ORDER DENYING APPEAL OR CERTIORARI

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IN THE

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October Term, 1956

No. 190—Appeal Docketed June 22nd

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v.

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v.

HON. JOY SETH HURD, ET AL., *Appellees*.

On Appeal from the Supreme Court of the State of Ohio

PETITION FOR REHEARING OF ORDER DENYING APPEAL OR CERTIORARI

To The Supreme Court of the United States and The Justices Thereof:

Petitioner Cooley Ellis, appellant herein, respectfully prays that this Honorable Court grant a rehearing of its determination in the above entitled matter dated October 8, 1956, under which appeal or certiorari was denied for "lack of a substantial federal question".[1] Petitioner states his reasons therefor as follows:

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[1] By order dated October 31, 1956, Justice Reed extended the time for filing a Petition for Rehearing herein to and including November 19, 1956.

I

It is the purpose of this petition to bring to the Court's attention reasons not assigned in the original appeal herein, indicating, we believe conclusively, that petitioner has been deprived of substantial federal rights guaranteed to him under the United States Constitution, and to clarify the basis for several grounds of appeal that were previously presented but which, in the confusion of the record, might not have been made sufficiently explicit. The ultimate aim of this petition is to prevail upon this Court to accept the present appeal for the purpose not so much of adjudicating various rights not adjudicated in the courts below as set forth in the original appeal herein, but, after examination of the record and of petitioner's present contentions, to remand the case to the Ohio courts for the adjudications which those courts have failed to make and which has had the effect of depriving petitioner of the due process of law guaranteed him under the Fourteenth Amendment to the United States Constitution.

II

1. It will be recalled that the present case involves essentially the validity of certain action taken by the State of Ohio through its Ohio Turnpike Commission in seizing, through the power of eminent domain under appropriation or condemnation proceedings, portions of real property of petitioner located on the outskirts of Toledo, Ohio, for the purpose of constructing the Ohio Turnpike through the center of that property. Although proceedings of this nature involve the taking of property against an owner's wish, and hence are universally regarded as one of the harshest known to Anglo-American law and where the requirements of due process are more than anywhere else to be strictly observed

(*Dohany* v. *Rogers*, 281 U.S. 362), petitioner has been entirely denied any procedural due process by virtue of the refusal of the Ohio courts to adjudicate various fundamental issues which have been raised by petitioner in the hearings below. By one procedural device or another, the Ohio Turnpike Commission has succeeded in denying petitioner justice in this case and in depriving him of extremely valuable property rights. The end result of the proceedings in the Ohio courts is that petitioner has not received adequate or, in respect to certain aspects of the State's acquisition of his land, any compensation for the rights that have been taken from him, and the extent of the title, right and interest which petitioner has been permitted to retain in that portion of his lands not seized by the State has been left in utter confusion and doubt.

2. More specifically, petitioner has not received an adjudication respecting various issues of state and federal law involving the validity of the seizure of his properties raised in petitioner's equity suit (See Jurisdictional Statement herein, p. 97a) which culminated in the procedendo proceeding in the Ohio Supreme Court (*State ex rel Ellis v. Murd, et al*, Jurisdictional Statement, p. 115a) which is a subject of the present appeal, and has not received an adjudication of various other of his rights as litigated in the condemnation or appropriation proceedings below (*Ohio Turnpike Commission v. Ellis*, Jurisdictional Statement, p. 62a) which also are the subject of appeal to this Court. It matters not whether such rights or issues have basis under state or federal law or even what is their precise nature. The point is that petitioner has had no adjudication at all respecting these issues, as a result of which he has had his property taken from him without full hearing, and this, in itself, amounts

to a denial of the due process of law to which defendants in any judicial proceeding, and particularly in a condemnation proceeding, are entitled under the Fourteenth Amendment. The due process clause protects the landowner from the adoption of any form of procedure in eminent domain cases which deprive him of a reasonable opportunity to be heard and so to present such objections and claims as he is entitled to make. (18 Amer. Juris. 633.) See also *Chicago, Burlington & Quincy R. Co. v. Chicago,* 166 U.S. 226; *Dohany v. Rogers, supra; Turpin v. Lemon,* 187 U.S. 51; *Huling v. Kaw Valley Improvement Co.,* 130 U.S. 599.

III

1. In respect to the lack of due process in the equity and procedendo proceedings, petitioner respectfully refers this Court to the following: Although petitioner's equity suit raised important issues under both state and federal law, the trial court disposed of them by allowing a general demurrer in spite of the fact that a number of the issues involved mixed questions of fact and law, and the intermediate appellate court in Ohio (Court of Appeals) to which the case was then appealed likewise refused to adjudicate such issues but merely sustained the demurrer without opinion. On appeal to the Supreme Court of Ohio, that court, without petitioner's consent, consolidated his appeal with that of another litigant (Solether) who in an entirely separate case also was contesting appropriation proceedings attempted by the Ohio Turnpike Commission, but who had raised only one of the many issues raised by petitioner. In its opinion in such consolidated appeal, the Supreme Court of Ohio made an adjudication respecting only that issue

(resolved in petitioner's favor), leaving unadjudicated (except by way of incidental reference to only several of the many other issues raised by petitioner) the balance of petitioner's contentions which indeed were his principal contentions. However, that court, in its formal judgment in the case, ordered the decision of the intermediate court (Court of Appeals) reversed in its entirety and seemingly remanded the case to the Court of Appeals for its determination of the balance of the issues raised by petitioner. While the judgment of the Ohio Supreme Court is somewhat ambiguous on the question of remand, that ambiguity was clarified by a letter dated July 7, 1954, addressed by the Ohio Supreme Court justice who wrote the decision in the case (Justice Charles B. Zimmerman) to the Clerk of the Supreme Court in respect to the framing of the judgment entry. This letter reads in part as follows:

> "It is my distinct impression that it was the intent of the Supreme Court to decide in the Ellis case only the question that was decided and raised in the Solether case, viz., that Ellis had the right to erect billboards, signs, notices, posters or other advertising devices on his lands not taken for turnpike construction purposes, and that it was not the intent or purpose of the court to render final judgment for Ellis with respect to other matters asserted in his petition. As I remember it, the lower courts, or at least the Court of Appeals, have not decided these other questions and they should certainly be the subject of a judgment by the Court of Appeals before the Supreme Court may dispose of them.
>
> "In my judgment, the proposed judgment entry you have prepared is about right and I think such entry should be confined to the limited proposition therein stated."

2. Based on the foregoing, petitioner assumed, and rightly so, that the case had been remanded to the Court of Appeals for determination of the unresolved issues in the case, and for that reason petitioner did not attempt to appeal the decision in the equity case to this Court. However, when the case was heard before the Court of Appeals pursuant to such remand, that court determined that the Ohio Supreme Court had decided all issues raised by petitioner and sustained a second demurrer filed by the Ohio Turnpike Commission without even allowing petitioner to amend his original complaint to raise certain other issues which either had not been raised before or which had come into existence by virtue of the conclusion of the condemnation proceedings which had been litigated concurrently. When petitioner appealed this determination of the Ohio Court of Appeals to the Ohio Supreme Court, that court dismissed the appeal without opinion. Petitioner accordingly commenced the procedendo action in the Ohio Supreme Court in an effort to have the court's original judgment in the equity case enforced by requiring an adjudication of the merits of petitioner's contentions by the Court of Appeals. In an opinion rendered on the same day that its opinion in the condemnation proceedings was issued, the Supreme Court of Ohio dismissed the procedendo proceedings on the ground that the petitioner's issues had been previously adjudicated. This decision as well as the decision in the condemnation proceedings are the subject of the present proceedings in this Court. As is obvious from the foregoing recital of the procedures in petitioner's equity suit, petitioner simply has not had the benefit of an adjudication on various serious issues raised in the equity case and thus has been deprived of the full hearing to which he is entitled under the due process clause of the Fourteenth Amendment.

IV

1. In the condemnation proceedings petitioner was accorded the same denial of due process by a similar refusal to adjudicate important issues raised here. While petitioner continues to insist, as previously pointed out in its appeal to this Court herein, that the determinations of the Supreme Court of Ohio in the condemnation cases were in error for the reasons there stated, and that such error involves issues of sufficient federal substance to warrant this Court's acceptance of that appeal,[2] it should in addition be pointed out that the failure of that court or of any other Ohio court to pass on other important issues raised below is equally erroneous and requires, if not an adjudication of such issues by this Court, at least a remand of the present proceedings to

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[2] The merit and substance of the issue respecting the adequacy of the compensation for the taking of his property awarded petitioner in the condemnation proceedings ($140,000 as both compensation for his property taken and for damages suffered by reason of such taking, an amount less than that to which several of the Commission's own experts on valuation testified) is graphically illustrated by the following fact: Prior to the condemnation proceedings petitioner offered, and the Ohio Turnpike Commission refused (1) the sum of $2,000,000 if the Commission would, as was feasible, bypass petitioner's property, which is a sum more than sufficient to compensate the Commission for any change in its plans that might be occasioned thereby, and (2) a free grant of land to the Commission if, as the Commission's own engineers admitted was feasible, the Commission would run its turnpike through one end rather than through the center of petitioner's property where a large shopping center and housing development was about to be constructed. Another flagrant instance of disregard of petitioner's rights in the condemnation proceedings below is seen in the exclusion of all testimony of petitioner's experts relating to the petitioner's completed plans (including lease commitments, approval of federal loans, etc.) for the immediate erection and operation of a shopping center and housing development on petitioner's property—plans started long before the turnpike project but now nullified. This Court has held that adequate compensation must include an evaluation of the best use to which the property could be put. "The general rule is that compensation 'is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future.'" **Chicago, Burlington & Quincy R. Co. v. Chicago,** 166 U.S. 226, at 250; **McGovern v. New York,** 229 U.S. 363, at 372.

the Ohio courts for adjudication of such issues there if petitioner is to be accorded full procedural due process.

2. Specifically, petitioner raised in the condemnation proceedings in the courts below, but was unable to obtain an adjudication concerning them, the following very important issues substantially affecting his rights and a denial of an adjudication or a rejection of which would operate to deprive petitioner of property without compensation and without due process:

(a) The final verdict in the proceedings granting the Ohio Turnpike Commission a strip through the center of petitioner's property appropriated to that Commission "any and all abutters' rights".[3] There is no attempt to define the term "abutters' rights" in either the resolution of the Turnpike Commission under which it sought to acquire the ""rights" in question or in the Act creating the Commission, nor was there any attempt made by either the Commission or the trial court in the course of the appropriation proceedings to explain just what such "rights" consisted of. The term is not one of art, and finds no definition in any of the standard legal dictionaries or in "Words and Phrases" or in real property texts. Whether the "rights" thus acquired are affirmative rights in the new owner to do certain things on his land, or, as is more likely, are negative rights accorded that owner under which petitioner, as the adjoining land owner, is denied privileges or rights in respect to the use or enjoyment of his property, is unknown. Petitioner apparently has no access rights to his remaining acreage and no way of putting in

[3] This verdict granted the Commission the following rights on petitioner's remaining lands:

"First: Any and all abutters' rights, including access rights, appurtenant to any remaining portion of the lands of said owner or owners of which the above-described real estate shall have formed a part prior hereto, in, over, or to the parcel described above as Parcel No. 51-G, including such rights to any turnpike constructed thereon." (See Jurisdictional Statement 30(a) and 80(a).)

either roadways or utilities. As a practical matter, petitioner has been refused title insurance on his remaining land by virtue of such appropriation of "abutters' rights", and, to a degree impossible to estimate, the value of all of petitioner's adjoining property has been diminished if not destroyed. For this he has been paid no compensation, nor has he even been accorded a determination of what the State has taken or of what he has been deprived, although the issue has been rpeatedly raised below. In addition to the property loss and damage thus sustained by petitioner, it would appear that the taking of "any and all abutters' rights" represents a taking of property so vague and indefinite in description as to constitute a violation of the due process of law guaranteed property owners in eminent domain proceedings under the Fourteenth Amendment to the United States Constitution.

(b) The decision of the Supreme Court of Ohio in the equity case *(Ellis v. Ohio Turnpike Commission)* held that the Turnpike Commission had no authority to deny petitioner the right to erect and maintain billboards or other advertising signs on his remaining property adjacent to the turnpike. The verdict appropriating petitioner's property for the Turnpike Commission contains language which on its face gives the right to erect such signs on petitioner's adjoining lands to that Commission.[4] Thus, there is not only an apparently dual right in petitioner and the Commission to erect signs on petitioner's adjoining property, but the value of petitioner's adjoining property has to that extent been impaired. Yet this factor was in no way taken into consideration in either evaluating damages to petitioner or

[4] This verdict reads as follows:
"**Second:** All rights to erect on any of the aforesaid remaining lands any billboard, sign, notice, poster, or other advertising device which would be visible from the travelway of Ohio Turnpike Project No. 1, and which is not now upon said lands." (See Jurisdictional Statement 30(a) and 80(a).)

in determining the value of the rights taken by the State, and the courts below have refused to resolve the obvious ambiguity.

(c) The verdict for compensation and damages in the appropriation proceedings against petitioner ran not only to petitioner but also to some twelve other individuals who were brought into the proceedings by the Commission but who have no title or interest whatsoever in the property appropriated. See Jurisdictional Statement 30(a) and 80(a). No attempt was made by the Commission or the courts to resolve the issue of ownership, with the result that although at the hearing the petitioner demonstrated he was the sole owner and was the only person to make an appearance in the appropriation proceedings, he now finds himself one of a dozen to whom compensation and damages are ordered to be paid. Again, this question was raised below to no avail.

V

The foregoing represents but some of many examples of the manner in which petitioner has been deprived of a hearing and determination respecting his rights. Other examples are set forth in the original appeal herein before this Court. It is respectfully suggested that in proceedings where, as here, the State has taken action to deprive an individual of his property under the stringent proceedings of condemnation, this Court should, as it has in the past, be particularly vigilant in according property owners adversely affected their full measure of due process. The present scope of highway development and the plans for future highway developments indicate that many an additional land owner will be put in petitioner's position, and it would indeed be most unfortunate if the treatment accorded petitioner in the present case by the Ohio Turnpike Commission stands as

precedent for similar treatment of hundreds and perhaps thousands of other owners of property whose lands are involuntarily seized.

WHEREFORE, it is respectfully requested that the appeal herein be granted for the purpose of determining from the record herein the degree to which petitioner has been deprived of federally-protected rights and to determine whether petitioner should either by way of remand to the state courts or by decision of this Court be accorded the full due process of law appropriate to exercise of the powers of eminent domain.

Respectfully submitted,

HERBERT S. THATCHER,
431 Tower Building,
Washington, 5, D. C.
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

This is to certify that the Petition for Rehearing filed herein is presented in good faith and not for delay under the sincere belief that it sets forth grounds not previously presented which require reexamination of this case by this Court. Petitioner does not attempt to reargue matters argued in petitioner's original appeal. As to delay, any delay operates to the prejudice of petitioner and not to the respondents who have already been granted and are presently enjoying all of the rights and benefits which they have sought or claimed in the proceedings below.

HERBERT S. THATCHER,
Counsel for Petitioner.

PROOF OF SERVICE

I, Herbert S. Thatcher, counsel for Cooley Ellis, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of November, 1956, I served copies of the foregoing Petition for Rehearing of Order Denying Appeal or Certiorari to the Supreme Court of the United States by first-class mail on the several parties thereto, as follows: Lockwood Thompson, Esq., 8080 Prospect Road, Berea, Ohio; Frank A. Harrington, Esq., Dwight H. Morehead, Esq., and William L. Kreutz, Esq., 405 Madison Avenue, Toledo, Ohio, Attorneys for Ohio Turnpike Commission.

HERBERT S. THATCHER,
Counsel for Petitioner.